IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 104

PARMELEE TRANSPORTATION CO.,
Appellant-Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., et al.,
Appellees-Respondents.

On Appeal from and Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR APPELLANT-PETITIONER, PARMELEE TRANSPORTATION CO.

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November 5, 1957

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I.

THIS COURT HAS JURISDICTION TO ENTERTAIN THIS SUIT.

A. On the Issue of Finality.

The appellees-respondents concede that the judgment of the court of appeals for the Seventh Circuit in this action is a final judgment for purposes of review in this Court. Appellees-respondents' Brief, pp. 10-14.

B. On the Issue of Parmelee's Standing to Maintain the Appeal.

Appellees-respondents apparently are willing to rest the test of Parmelee's standing on *Frost* v. *Corporation Commission*, 278 U.S. 515 (1929) and *Alton R. Co.* v. *United States*, 315 U.S. 15 (1942). Appellees-respondents' Brief, pp. 14-15. At the same time they suggest that the test of Parmelee's standing is whether it can prevail on the substantive issues in the case. They would thus equate the issue of jurisdiction with the issue on the merits. We are certainly willing to abide by such a test of our right to maintain this suit in this Court. It would seem, however, that here as in the district courts, issues of jurisdiction precede issues of substance. Cf. *Bell* v. *Hood*, 327 U. S. 678 (1940). We submit, therefore, that the *Frost* rationale supplies a basis for the maintenance of this action regardless of the outcome of this litigation. Appellees-respondents have now conceded that their operation of transfer vehicles in Chicago without a license is in violation of provisions of the Municipal Code which are validly applicable. See point II, *infra*.

II.

THE FAILURE OF TRANSFER TO APPLY FOR A LICENSE FOR ITS VEHICLE PRECLUDES ITS ATTACK ON THE CONSTITUTIONALITY OF THE ORDINANCE.

In this Court, for the first time, the appellees-respondents concede that the licensing provisions other than those contained in § 28-31 are applicable to the vehicles used by Transfer in its business. Appellees-respondents' Brief, pp. 17, 36, 46. No such licenses have been sought. Certainly, under the terms of the ordinance, the validity of which is now conceded by the appellees-respondents, the issuance of a license is not a merely ministerial act.

Application for a license is required by § 28-5, not § 28-31. See appellant-petitioner's Brief, p. 4 a. It is unlawful to operate a public passenger vehicle without such a license, by the terms of § 28-2, not § 28-31. *Ibid.* at p. 3a. Section 28-4 requires that the vehicles to be licensed be inspected "and found to be in safe operating condition and to have adequate body and seating facilities which are clean and in good repair for the comfort and convenience of passengers." *Ibid.* at p. 4a. Further specications as to the construction of the vehicle are contained in § 28-4.1. *Ibid.* Section 28-6 requires the investigation of "the character and reputation of the applicant as a law-abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace the equipment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation of a public passenger vehicle during the license period." *Ibid.* at pp. 4a-5a. Only if the commissioner finds that the requirements are met is he to issue a license. *Ibid.* And § 28-12 requires that the licensee, to qualify, must satisfy the commissioner as to the insurance which he carries or post an adequate bond in lieu thereof. *Ibid* at 7a. So far as this record reveals, there is no evidence that Transfer or its vehicles meet the various requirements which are prerequisite to the securing of a license. Indeed, the only evidence in the record is that vehicles operated by Transfer at the time of the filing of this suit did not meet the requirements. R. 208-209.

All this underlines the fact that the attack on the ordinance by the appellees-respondents is premature. It may be that Transfer will not be denied a license, in which event no question of the constitutionality of the statute could be raised; or it may be that Transfer will be denied

a license for failure to comply with those sections of the statute which they now concede to be applicable to them, in which event no question of constitutionality of the ordinance could be raised; or, as we have previously indicated, the denial of a license might rest on § 28-31, but grounded in the proper exercise of the state police power, in which case the constitutionality of the ordinance would not be questionable. Clearly, in this posture, the case calls for the vacation of the judgment of the court of appeals, with an order comparable to that issued in *Clark* v. *Poor*, 274 U. S. 554, 558 (1927), under similar circumstances:

> "The decree dismissing the bill is affirmed, but without prejudice to the right of the plaintiffs to seek appropriate relief by another suit if they should thereafter be required by th Commission with conditions or provisions not warranted by law."

To do otherwise would be to bring the court into conflict with one of its long-established principles. For, as Mr. Justice Brandeis said in his opinion in *Ashwander* v. *T.V.A.*, 297 U.S. 288, 346-47 (1936):

> "The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' . . . 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'" (Citations omitted.)

Since, on this record, no showing is made of the need to resolve the question of the constitutionality of § 28-31, the judgment of the court of appeals should be vacated.

III.

THE APPLICATION OF SECTION 28-31 OF THE MUNICIPAL CODE OF CHICAGO IS CONSISTENT WITH THE COMMERCE CLAUSE OF THE CONSTITUTION.

It is not surprising that appellees-respondents propose to rest their case on decisions of this Court which have long since been relegated to the concern of historians. Whatever may be said on behalf of the nineteenth century doctrines at the time of their application, new circumstances have caused the Court to frame a different construction of the Commerce Clause. As this Court has said in a different context: "In approaching this problem, we cannot turn the clock back to 1868 . . . ." *Brown* v. *Board of Education*, 347 U.S. 483, 492 (1954).

The underlying thesis of the cases and authorities relied on by appellees-respondents is best characterized by their quotation from the Report of the Committee of the House of Representatives on p. 29 of their brief: " . . . no State can constitutionally enact laws or any regulation of commerce between the States, whether Congress has exercised the same power in question or left it free." The cases cited in our main brief reject such an approach to the Commerce Clause. As this Court has had occasion to say over and over again, in recent years, interstate commerce is not immune from the proper exercise of local police power.

> " . . . there are many matters which are appropriate subjects of regulation in the interest of the safety, health and well-being of local communities which, because of their local character and their number and diversity and because of the practical difficulties involved, may never be adequately dealt with by Congress. Because of their local character also there is wide scope for local regulation without impairing

> the uniformity of control over the commerce in matters of national concern and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the commerce clause. Such regulations, *in the absence* of supervening Congressional action, have for the most part been sustained by this Court, notwithstanding the commerce clause." *Duckworth* v. *Arkansas,* 314 U.S. 390, 394-95 (1941).

Certainly among those matters to which Mr. Chief Justice Stone referred in the *Duckworth* case was the control over streets and traffic by local municipalities. The quotation from *Railway Express Agency, Inc.* v. *New York,* 336 U.S. 106, 109-11 (1949), in our main Brief at pp. 50-51, disposes of this question.

The appellees-respondents do not show, because they cannot show, any federal law or regulation which is in conflict with the regulatory provisions of the relevant sections of the Municipal Code of Chicago. They assert that the transfer activities in question could be made the subject of regulation by the Interstate Commerce Commission. With this we have no quarrel. To the extent that the I.C.C. undertook to regulate these transfer activities, municipal regulation would be superseded. The fact is, however, that no such federal regulation has been undertaken.

Transfer is sought to be brought into the category of a "certificated carrier" by two rather transparent devices. First, it is argued that Transfer "is simply the *alter ego* of the railroads." Appellees-respondents' Brief, p. 20. A glance at the record disposes of this argument. The agreement between Transfer and the railroads makes it clear that Transfer is an independent contractor and not even an agent. Paragraph 11(f) of the contract provides:

"Transfer shall employ and direct all persons performing any service hereunder and such persons shall be and remain its sole employees and subject to its sole control and direction, *it being the intention of the parties that Transfer shall be and remain an independent contractor*. Transfer agrees to conduct the work provided for herein in its name and agrees not to display the name of any of the Terminal Lines upon or about any of its vehicles." R. 40; emphasis added.

The contract also provides that Transfer supply, own, and operate the equipment and vehicles (Par. 2 (c); R. 28); that Transfer save the railroads harmless from any and all loss or damage resulting from the operation (Par. 10(c); R. 37-38); and that "Transfer shall comply at all times with all laws, rules and regulations of governmental agencies having jurisdiction over it, and/or the services performed hereunder" (Par. 10 (k) (1); R. 40). Certainly this last clause makes it clear that the parties contemplated that governmental agencies would have power over "it", *i.e.* Transfer, differing from the control over the railroads. Transfer is nothing more than an independent contractor, like the butcher, the baker, and the candlestick maker, providing services for which the railroads are paying. It is not conceivable that the butcher supplying the railroads becomes immune from local zoning or health regulations because of that contract. Similarly, it is inconceivable that the railroads should have authority, by a contract, in which they protect themselves from the actions of Transfer by treating it as an independent contractor, to immunize the transfer company from the requirements of local public safety and welfare regulations.

It is argued, too, that the services performed by Transfer are really railroad services which the railroads are

required to provide because provision is made therefor in the tariffs. The fact is that neither the Interstate Commerce Act, nor the regulations issued by the I.C.C. nor the tariffs filed by the railroads require the railroads to render transfer service to through passengers in the Chicago area. It is a purely voluntary matter from which the railroads may withdraw at any time, without I.C.C. permission.

The voluntary nature of these services was recognized by the I.C.C. in *Status of Parmelee Transportation Co.*, 288 I.C.C. 95, 104 (1953), quoted in our principal Brief at pp. 38-39. It was similarly recognized by the appellees-respondents in their contract: "The Terminal Lines have found it desirable to provide a transfer service between terminal stations in Chicago, and between said stations and steamer docks." R. 26. And it is specifically recognized in the tariff itself, which provides that in Chicago "Transfer ticket (including transfer of passenger and all baggage) *may* be issued without charge . . .". R. 195; emphasis added.

Transfer is not a certificated carrier. It is not even carrying on a function which the railroads are required to provide. Transfer cannot be brought within the doctrine limiting the power of the states to require licenses of federally certificated carriers.

IV.

THE STANDARDS OF SECTION 28-31 ARE NOT LIMITED TO "ECONOMIC CRITERIA".

The case is before this Court without the assistance of the local agency's application of this ordinance. It is urged that the section is void on its face as calling for the imposition of "economic criteria" to the question whether

licenses should be issued to Tranfer. Such contention rests on the thesis that "the phrase 'public convenience and necessity' includes only the economic regulation of transportation and not any elements of the police power." Appellee-respondents' Brief, p. 39. This contention is obviously in error.

This Court has recognized that the phrase in question is an elastic one of many meanings depending on the statute and the circumstances of its application. Cf. *F.C.C.* v. *National Broadcasting Co.*, 347 U.S. 284, 289, n. 7 (1954). More to the point, however, is that this Court, in a context not dissimilar to the one presented by this case, has held that the phrase embodies the application of safety standards. Thus, in *Bradley* v. *Public Utilities Commission of Ohio*, 289 U.S. 92 (1933), the appellant, an interstate carrier, had been refused a "certificate of public convenience and necessity" (289 U.S. at 93) by a state commission. The appellant asserted that it was beyond the power of the state commission to refuse such a certificate because of the nature of appellant's business, *i.e.*, he was engaged in interstate commerce. Mr. Justice Brandeis spoke for the Court, in the rejection of appellant's contention. And in sustaining the action of the Public Utilities Commission in denying the certificate on grounds of the police power, he said: "Safety may require that no additional vehicle be admitted to the highway. The Commerce Clause is not violated by a denial of the certificate to the appellant, if upon adequate evidence denial is deemed necessary to promote the public safety." 289 U.S. at 96. It would be difficult to find a more direct refutation of the point made by the appellees-respondents on this score.

In addition, it should be noted that the administrator charged with the enforcement of the ordinance has spe-

cifically disclaimed the power to apply economic standards under this section of the ordinance to interstate carriers. See Brief for appellant-petitioner, p. 42. See also Reply Brief of the City of Chicago in No. 103, p. 2. The ordinance is applicable to intrastate as well as interstate carriers and criteria are included which may appropriately be considered only in the issuance of licenses to carriers performing intrastate services. Moreover, the language of the section in question specifically provides that one of the criteria to be applied in determining whether to grant a license shall be "The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation," § 28-31.1 (2); appellant-petitioner's Brief, p. 17a. The amorphous nature of the test of "convenience and necessity" is further certified by the fact that the ordinance requires the commissioner to take into consideration in determining whether to grant or deny a license, "Any other facts which the commissioner may deem relevant." § 28-31.1 (4); appellant-petitioner's Brief, p. 18a.

On page 41 of their Brief, appellees-respondents seek support for their concept of "public convenience and necessity" as confined to economic considerations by arguing:

> "Section 28-31.1 was copied bodily from § 28-22.1 of Chapter 28 which regulates taxicabs (R. 183-184). This section was construed by the Supreme Court of Illinois in 1947 to be a measure for the economic regulation of the taxicab business, a means of limiting the number of cabs for the purpose of limiting competition, and was held valid. *Yellow Cab Co.* v. *City of Chicago*, 396 Ill. 388, 71 N.E. 2d 652."

But this is not so. The Illinois Supreme Court sustained the city's power to limit the issuance of taxicab licenses under the standard of "public convenience and necessity"

not restricted to considerations of "economic regulations of the taxicab business" but as specifically including considerations of street traffic, problems of congestion, public safety and local police power requirements. The Illinois Court said, 396 Ill. 388, 71 N.E. 2d at page 657:

> "Certainly, the city of Chicago, having the right to regulate traffic and parking, to build bridges, viaducts, tunnels and sewers, to select streets for through or local traffic, to levy a city vehicle tax, to provide for the underground laying of wires or other facilities in the street, and to provide for the general policing of the city, could, in the exercise of its powers conferred upon it by the legislature, properly determine the number of taxicabs which it would permit to be operated in the city of Chicago. Any conclusion other than this would render ineffective the authorizations by the legislature to the city for the regulation of traffic and parking and the policing of the city. It is well known and this court takes judicial notice of the facts that there are numerous congested areas in the city of Chicago and that the very nature of the taxicab business contributes to this traffic congestion."

And then again on page 658:

> "The city council of the city of Chicago, in the exercise of its legislative discretion, could well have determined that this ordinance was a proper exercise of its police power for the regulation of the taxicab business and the regulation of the traffic and congestion upon its streets."

This authoritative interpretation is equally applicable to the similar section of the ordinance dealing with terminal vehicle licenses.

The variety of matters which may go into the application of the statutory principle of public convenience and necessity simply underline the fact that the appellee

respondents are in no position to assert injury until such time as they can show that they have been denied a license on unconstitutional grounds. They can, of course, make no such showing until a license has been applied for, but no application has been made.

V.

THE COURT OF APPEALS ERRONEOUSLY INTERPRETED THE ORDINANCE ON THE BASIS OF ALLEGED "LEGISLATIVE HISTORY".

In their Brief, appellees-respondents assert: 1) that the reference of the court of appeals to the motives of the city council was not a factor in that court's decision, and 2) that the recourse to legislative history was proper and sustained the decision of the seventh circuit.

Both propositions are in error. But if the references impugning the motives of the city council were irrelevant to the decision, it is the more shocking that the court of appeals should indulge itself in this manner. The fact is that the "legislative history" was deemed particularly important. After quoting that portion of the ordinance which provides that the issuance of licenses should be determined, *inter alia*, on "The effect of an increase in the number of such vehicles on the safety of existing vehicles and pedestrian traffic in the area of their operation," R. 207, the court of appeals proceeded to read that provision out of the ordinance. It quoted from the appellees-respondents argument that "as a purported safety measure, this is sham and spurious." The court's conclusion was that the purpose of the city council was to control the determination of the transfer agent and not to "exercise . . . . the city's police power over traffic." *Ibid.* "If there were any doubt that this conclusion is correct,

the legislative history of the ordinance dispels that doubt." *Ibid.* "The proceedings of the committee fail to indicate that the chairman or any member of the committee was interested in traffic regulations or any other aspect of the city's police power." *Ibid.*

It is respectfully submitted that this is an extraordinary and invalid method of statutory interpretation. This Court is too well acquainted with the legislative history of many statutes to be reminded that 1) where the legislation clearly states that a standard exists—here the standard of vehicular and pedestrian safety—legislative history may not be used to read such a section out of the statute; and 2) that there are many statutes enacted in which important portions of the act are not discussed in the reported committee deliberations, or in debate on the floor of the legislative body itself.

We should also point out that the so-called legislative history upon which the court of appeals relied, consisted solely of a brief informal colloquy at a committee hearing and a summarization of that colloquy. R. 90-94.

We submit that this point has been adequately answered in the Reply Brief for the City of Chicago in No. 103 at pp. 10 and 11.

Respectfully submitted,

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